

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1634 ORIGINAL

To be argued by
CLIFTON F. WEIDLICH

In The
United States Court of Appeals
For The Second Circuit

MARY BROEDY,

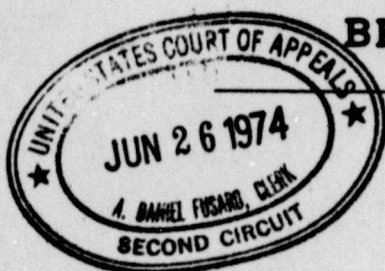
Appellee,

vs.

PHYLLIS McGUIRE,

Appellant.

*On Appeal from Judgment of the United States District
Court for the Southern District of New York.*



BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Defendant-Appellant Phyllis McGuire, one of the nationally known performing artists and singers, The McGuire Sisters.

On November 12-13, 1973 the case was tried to the Court, Hon. J. Edward Luxbard, sitting by designation in the District Court, Southern District of New York. On December 13, 1973 the District Court filed its opinion, awarding damages of \$15,240.15 to Plaintiff-Appellee, Mary Broedy, with a complex award of interest to be computed by the parties. On January 7, 1974 judgment against defendant in favor of plaintiff was entered by the Clerk for damages of \$15,240.15, and interest running back to 1963 of \$11,276.35. Costs of \$206.15 were added on February 6, 1974. Defendant appeals from all parts of the judgment.

STATEMENT OF THE CASE

A. Nature of the Case:

This is a diversity action instituted in the New York Supreme Court on August 26, 1969, and duly removed to the District Court. Jurisdiction over defendant McGuire was obtained by service of process upon her at her domicile in Nevada pursuant to the New York "Long-Arm" Statute.

The action is for goods sold and delivered and for services rendered by plaintiff, an interior decorator. She alleges that between October 1, 1961 and December 30, 1964 she sold certain goods, consisting of household furnishings, and rendered services, reasonably worth some \$18,000.00. Defendant pleads a general denial and the affirmative defense of the New York Six-Year Statute of Limitations, but did not press on the trial a defense of the Statute of Frauds. Plaintiff filed no reply, but has contended, before, at and after trial, that defendant's non-residence in New York tolled the State of Limitations as pleaded by defendant.

B. Proceedings and Disposition in the Court Below:

After decision rendered on December 13, 1973, defendant moved the District Court on January 14, 1974 for partial new trial and to alter and amend certain findings and conclusion, set out in its Opinion, pursuant to FRCiv.P 52(b) and 59. Both defendant's motions were denied on February 27, 1974; application for reargument of both motions was denied, by memorandum endorsed, on March 18, 1974.

Defendant also appeals from the order denying her motions for new trial and other relief.

ISSUES PRESENTED

1. Did the District Court err, as a matter of law

and fact, in granting judgment in plaintiff's favor, in denying defendant's motions for partial new trial and to amend the findings and conclusions set out in its Opinion, and in overruling defendant's motion to dismiss so much of the complaint as is barred by the New York Six-Year Statute of Limitations.

2. Was the judgment rendered violative of defendant's rights under the Equal Protection Clause of the XIVth Amendment to the United States Constitution?

STATEMENT OF FACTS

This diversity action, for goods allegedly sold and services rendered by plaintiff, Mary Broedy, to defendant, Phyllis McGuire, was instituted on August 26, 1969 in the Supreme Court of the State of New York, Bronx County (A3, 11). In personam jurisdiction was obtained over defendant under N.Y. CPLR, 302(a)(1), the N.Y. long-arm statute. The action was removed to this court, defendant then being a citizen of Nevada (A 11).

Plaintiff, an interior decorator, entered into an oral contract in October 1961 with defendant, a professional entertainer and member of the McGuire Sisters, to do over the bathroom in the latter's New York City apartment, located at 525 Park Avenue. Previously, in association with one, Dudley Sills, plaintiff had performed decorating services at the same apartment consisting of five rooms (A12, 130).

The work on the bathroom was to be completed by the time of defendant's return from England after a command performance before Queen Elizabeth. An advance payment of \$5,000.00 in cash was made to plaintiff by defendant, but the bathroom renovation was unsatisfactory to defendant and she was never billed for it, until the trial, where plaintiff claimed it cost her \$2,855.00. (A13-14).

On the trial, too, plaintiff claimed 10% commissions of \$2,112.00, but no invoice ever included a commission in any amount and they were disallowed by the court (A3, 14).

Defendant's main defense rests upon the New York six-year statute of limitations, which was affirmatively pleaded in her answer (A4). Plaintiff filed no reply to defendant's affirmative defense, but has contended constantly that the limitation period was tolled by defendant's non-residence.

The plaintiff's alleged services and delivery of goods are with two exceptions set out in plaintiff's answer to interrogatories, but the dates are incorrect in a number of instances. They run from December 23, 1961 (incorrectly stated as 1964) to May 1964 as the court correctly found (A12).

The evidence of invoices sent to defendant is confusing. Plaintiff called defendant as her first witness and sought to identify through her a batch of some 48 invoices. Half that number, which defendant herself had produced, were

put in evidence and later through plaintiff 48 more were introduced. This needless duplication was not explained.

In any case the invoices, Plaintiff's Exhibit 1, are set out in Appellant's Appendix (A183-230) and show the true dates of claimed delivery or service.

The true dates show that all are barred by the six-year statute except two, dated May 15, 1964 (A226 and 227) and one dated December 26, 1963 (A228). These three aggregate only \$325.10. Substantially all alleged work was done in 1962.

No invoice was ever rendered for the custom bathroom fixtures in the amount of \$4,541.50, the largest item. Delivery was not made to defendant, but an estimate of American S.E.R.P.E. Corporation was admitted in evidence (Ex. 7, A232). This was presumably in substitution for the original renovation (A13).

The next largest item, two rugs custom made, in the amount of \$2,641.95 is undated in the plaintiff's answer to interrogatories (A9), but a handwritten copy was given to defendant's counsel shortly before trial (A218). In that connection plaintiff testified that the two rugs replaced some Persian rugs belonging to defendant which plaintiff sold for \$1,000.00. Although not pleaded the Court gave defendant a credit of \$1,000.00 against the judgment rendered against her (A14).

The court after trial dismissed the defense of the Statute of Limitations in toto; it awarded plaintiff damages of \$15,240.15 with accrued interest of \$11,276.35 and costs of \$206.15, making the total sum of \$26,722.65.

If the statute of limitations is not tolled on this appeal, the three items not barred by the statute in the total sum of \$325.10 should be offset by the credit of \$1,000.00 given defendant in connection with the sale of her Persian rugs. Thus, judgment of \$674.90 should be entered in defendant's favor.

ARGUMENT

POINT I.

THE DISTRICT COURT ERRED IN ITS UNPRECEDENTED
CONSTRUCTION OF THE NEW YORK STATUTE (N.Y.
CPLR 207), TOLLING THE SIX-YEAR STATUTE OF
LIMITATIONS, AND IN ITS DISREGARD OF DECISIONS
OF NEW YORK STATE COURTS AND OF THIS CIRCUIT
COURT, CONTRARY TO THE ESTABLISHED DOCTRINE OF
ERIE R. CO. v. TOMPKINS.

The District Court found that the instant action was instituted in the New York Supreme Court, Bronx County, on August 26, 1969 under the New York long arm statute, N.Y. CPLR 302(a)1. (A 11, Addendum III).

Defendant is a casualty of the recent radical shift of procedure in the acquisition of personal jurisdiction over non-domiciliaries in New York and elsewhere. The concept of due process laid down in Pennoyer v. Neff (95 U.S. 714) based on personal delivery of process within the forum state, has been abandoned.

Radical departure from Pennoyer, decided in 1877, was taken in 1945 by the U.S. Supreme Court in International Shoe Co. v. State of Washington (326 U.S. 310, 316). It held that due process to subject a defendant to in personam judgment requires that

"if he be not present within the territory of the forum ~~/that/~~ he have certain minimum contacts with it, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

Following the lead of Illinois, a "single act"

statute also known as the long-arm statute, was enacted in New York in 1962 (Addendum III). The object of the statute was to take advantage of the constitutional ruling of International Shoe conferring power to subject non-domiciliaries to in personam jurisdiction when they transact any business in New York (Addendum III). The provision is retroactive, for the Illinois model of the New York long-arm statute has been so interpreted in the leading case of Nelson v. Miller, 11 Ill. 2d 378, 143 N.E. 2d 673 (1957). The significance of this holding to the instant case, entirely missed by the court below, will be discussed hereinafter.

The New York six-year statute of limitations is applicable to all claimed items of goods and services allegedly sold and rendered by plaintiff, except three (A15, N.Y. CPLR 213(2)). The three invoices, post-dating August 26, 1963 (six years before this action was commenced) aggregate in amount \$325.10 (A15, A226, A227, A228).

The last two items, incorrectly dated 1/64 in plaintiff's answer to interrogatories (A10), bear the true dates of January 4, 1963 and June 21, 1962 (A229, A230), (A179-182). Both fall within the six-year bar of limitations running back to August 26, 1963 (A15).

N.Y. CPLR 207 provides in two parts for suspension of the time periods of statutes of limitation; (1) if defendant is without the state of New York when the action accrues, the limitation period of time is computed upon his

coming into or returning to New York; (2) if defendant departs from the state, after accrual of a cause of action against him, and remains continuously absent for four months or more, the time of his absence is deducted from the time or period within which the action must be begun (Addendum, 1).

The foregoing clauses were derived from the N.Y. C.P.A. §19 and C.C. Procedure §401, referred to below under the misnomer of the old Civil Procedure Act (A17, A21). Their history from the Revised Statutes is set out in the opinion, per Lehman, J., in Mack v. Mendels, 249 N.Y. 356 359 (1928) where the Court of Appeals of New York said:

"The courts construe provisions made by the Legislature creating exceptions or interruptions to the running of the time limited by statute in which an action may be begun. They may not themselves create such exceptions. Ruggles v. Keeler, 3 Johns, 265, 3 Am. Dec. 482."

Standard Civil Practice Service, Vol. 1, p. 116 in Advisory Committee notes points out that Section 19, C.P.A., was substantially revised in 1943 (New York Law Rev. Comm. Rep. 127, 164 (1943):

"The basic change effected by the revision was to make inapplicable the suspensory provisions of Section 19 in all cases where constructive service of summons is by law made equivalent to personal service of summons within the state."

Here our concern is with the second clause, departure from New York after accrual of the cause of action, since defendant was domiciled in New York prior to 1957, when she first met plaintiff (A7). Thereafter in 1959 she sub-

leased the apartment from Milton Berle and occupied it until October 1967 under her own lease. Until October 1968 plaintiff paid the rent on the 525 Park Avenue apartment (A16-17, A126, A239). The District Court concluded that plaintiff "changed her residence" to Las Vegas in June 1967, not that there was a change of domicile (A16-17). Admittedly defendant acquired another residence in Las Vegas in June 1967, but did not move her belongings and household furnishings from New York until September 1968 (A 16).

Paragraph numbered 3 of CPLR 207, however, is new, enacted as part of Article II, CPLR, Limitations of Time, in 1962, which became effective on September 1st, 1963 (A17).

207(3) makes a third exception to tolling the statutes of limitation on account of "Defendant's absence from state" as follows:

"This section [207] does not apply:

"3. While jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to him within the state."

(Addendum, 1).

Weinstein-Korn-Miller says that this provision was added to take advantage of the expanded concepts of jurisdiction introduced with the CPLR some 12 years ago (Vol. 1, ¶207.02). Undoubtedly the reference is to the long arm statute, conferring extra-territorial jurisdiction in

specified instances, which we have discussed at p. 7, supra.

But Judge Lombard's construction of its meaning was different and was made in conjunction with the transitional N.Y. CPLR section 218(b), which neither party had cited, as follows:

"Defendant claims that even if she did move in 1967 the statute was not tolled because N.Y. CPLR § 207(3) prevents tolling when the defendant can be served without personal delivery of process within the state. McGuire maintains that plaintiff could have served her under the long arm statute, N.Y. C.P.L.R. § 302, or by some form of substituted service, N.Y. C.P.L.R. § 308(5). See generally *Goodemote v McClain*, 40 App. Div. 2d, 22, 337 N.Y.S. 2d 79 (1972). Plaintiff argues that this provision only applies when the defendant's whereabouts are known, which she says is not the case here. This issue need not be decided because subdivision (3) of § 207 does not apply to this case. That subdivision was added in 1962 and became effective on September 1, 1963. This was after the claims allegedly barred by the statute of limitations had accrued. N.Y.C.P.L.R. § 218(b) says that if an action has accrued when the law becomes effective, the court should apply the provision, either old or new, that allows the action."

Although no New York State court decisions were cited in support of this unprecedented construction of the State statutes, the court later, on defendant's motions to amend findings and for a partial new trial, said that while the recent State court decisions cited by defendant -

"tend to support defendant's position, the court is not bound to follow them."

(A 43-45; A26-42).

In so ruling, we respectfully submit, the conclusion reached is squarely contrary to the landmark case of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Two cases

cited by defendant were deemed to be of no binding force on the District Court: Marcus v. Slenker, 20 NY 2d 820, 284 NYS 2d 710 (1967) because the New York Court of Appeals decided it without opinion and Burris v. Alexander Mfg. Co., 51 Misc. 2d 543, 273 NYS 2d 542 (1966) because it was a nisi prius decision.

Erie Railroad Co. v. Tompkins (304 U.S. 64), overruled the doctrine pronounced by Swift v. Tyson (16 Pet. 1) almost a century before. Speaking through Brandeis, J., the Court abandoned the prior doctrine of Swift v. Tyson looking to consistency or uniformity of decisions in Federal Courts throughout the country. Absent a governing Federal statute or constitutional provision, the Court held that the true uniformity of justice to be sought was consistency on the same rule of decision within the state where the litigants were at issue, whether in a State or Federal court (304 U.S. 64, at 78). The new New York Civil Practice Law & Rules, replacing the old Civil Practice Act and Rules of Civil Practice, achieves measurably more uniformity of procedure in the various state courts than any of the three predecessor acts (Weinstein-Korn-Miller, ¶101.05).

Under both the new New York Laws & Rules and the old Practice Act, appeal practice in the intermediate Appellate Division and in going to the Court of Appeals is much more complex than, say, in Connecticut, where no intermediate court exists between the general trial court (Superior) and the

highest court (Supreme Court). There the general requirement is that only final judgments or orders are appealable. In New York, on the other hand, almost any and all orders are appealable to the intermediate Appellate Division of the Supreme Court.

For many years in New York the sole method of appeal [on non-constitutional questions] to the Court of Appeals from a non-final determination of the Appellate Division was, and still is, by leave granted by the Appellate Division (CPLR, 5602(b), Cohen & Karger, Rev. Ed., §82 n. 13). The practice in review of the Court of Appeals of non-final determinations of the Appellate Division requires the latter court to certify all questions of law it may have to the higher court. Despite permission granted, the appeal will not be entertained unless questions are certified (Cohen & Karger, Powers of the New York Court of Appeals §85).

In the light of this rudimentary sketch of New York State appeal practice, we look at Marcus v. Slenker, 20 N.Y. 2d 820, 284 NYS 2d 710, cited by defendant in her reply brief as a controlling New York State court decision. Handed down in 1967, that Court of Appeals' ruling is deemed of no binding effect upon the District Court since

"the Court of Appeals held without opinion that the statute of limitations had in fact been tolled, although the trial court in the case indicated that §207(3) [CPLR] applied to actions which accrued before 1963."

(A44)

The Court below has obviously misapprehended the appeal practice followed in Marcus v. Slenker. There was no trial and no final judgment; instead Mr. Justice Hecht, sitting at Special Term, Supreme Court, New York County, entered a non-final order denying a motion to dismiss an action on the ground, among others, of the statute of limitations. The order was unanimously affirmed by the Appellate Division of the Supreme Court, First Department, which, in turn, certified the question of the propriety of its order of unanimous affirmance to the Court of Appeals.

Only by this procedure could the non-final ruling of the Appellate Division be taken to the Court of Appeals, viz., by certification: "was the order of the Special Term proper?" The answer given was yes, in a memorandum decision (20 NY 2d 820) in which the Court of Appeals said:

"The Supreme Court, Special Term, New York County, William C. Hecht, Jr., J., entered an order denying the motion of defendant to dismiss the complaint and held * ** that applicable three-year statute of limitations had been tolled at least from December 25, 1961 when defendant left New York until September 1, 1963, the effective date of CPLR which provides in CPLR 302 for the obtaining of jurisdiction without personal service in New York, and in CPLR 207 makes tolling provisions inapplicable while it can be so obtained, and that the court had jurisdiction over defendant under CPLR 302 providing that court may exercise personal jurisdiction over any non-domiciliary who commits a tortious act within the state."

In Marcus v. Slenker the decision on three levels of the courts was passed upon by twelve judges - not merely by a single trial court. The several rulings were in accord

with defendant's contention that there was no tolling of the limitation time or period after June 1967, that being after September 1, 1963 when CPLR 207 and 302 went into effect. In other words plaintiff could have served defendant under the New York long-arm statute at any time after CPLR 302 (Addendum III) went into effect in 1963; she need not have waited until August 26, 1969, six years less five days later. Further, the New York courts held that CPLR 207(3) -

"makes tolling provisions inapplicable while long arm service can be so obtained * *."

The only difference in the cases is that the tolling in Slenker on account of defendant's absence was partial, having occurred before the effective date of N.Y. CPLR, whereas in the case at bar there was no tolling at any time since defendant resided in New York, as found, before and after the effective date, September 1, 1963. Therefore, even if defendant had not "removed" to Nevada in June, 1967, CPLR 207 was then in effect, as was CPLR 302(a)1, which rendered the tolling provision inapplicable.

In the ascertainment of state law as, called for by Erie v. Tompkins, no general rule permits the federal courts to disregard all decisions rendered at nisi prius; certainly no such rule would give the federal courts carte blanche right to ignore, as has been done here, a decision passed upon by twelve judges of the Supreme Court, Appellate Division of the Supreme Court and the Court of Appeals of

the State of New York. Any such rule would empower the federal court (one Judge sitting) to overrule summarily both intermediate and final appellate state court decisions, as well as those rendered at the trial level.

Moore's Manual, §424.2, disapproves of such practice, citing U.S. Supreme Court cases to the contrary. In any event the lack of an opinion by the Court of Appeals does not detract from the stare decisis effect of the case.

The second clause of CPLR 207 (continuous absence from New York for four months or more) is applicable to both resident and non-resident defendants.

Meyers v. Credit Lyonnaise, 259 N.Y. 399 (1932).

It is also applied to causes of action which have accrued outside New York. In such cases CPLR "borrows" the limitations' statute of the foreign state; where CPLR incorporates a foreign limitation into New York law as an additional limitation, it incorporates the foreign tolling provision with it. This was done in Burris, but not as an interpretation of Tennessee statutory laws allegedly analogous to New York law as the court below asserted (A44-45). By virtue of CPLR 202 the New York Supreme Court was duty bound to construe the foreign state's statute of limitation, the tolling period thereto and the long-arm statute under which the action was brought in New York (Addendum, II).

Burris v. Alexander Mfg. Co., 51 M 2d 543, 273
NYS 2d 542.

Daigle v. Leavitt, 54 M 2d 651, 283 NYS 2d 328
(1967)

Prouty v. Drake, 18 M 2d 887, 891-2, 152 NYS 2d
271, 276-7 (1959).

Weinstein-Korn-Miller Vol. 1, ¶207.03.

In view of the "borrowing" statute of New York, it cannot be properly said, as this court did, that the statutes of a foreign state, similar to New York "law", were interpreted by the New York Supreme Court (A44-45).

Both of the cited cases (Marcus in the New York Court of Appeals and Burris in the New York Supreme Court) were instituted under long-arm statutes, as was the case at bar. In both cited cases the statutory period resumed running after the long-arm statute and CPLR 207(3) became effective. So, here, the six-year period, which started running in 1961 continued to run without interruption until August 26th, 1969, when process was delivered to defendant in Nevada. In the case at bar there was no resumption of the statutory period, since no tolling thereof had commenced before the new New York CPLR took effect. Since defendant was without question both a resident and domiciliary until June 1967, it was not possible to toll the limitation period prior thereto.

Noting that the District Court in holding as a matter of law that CPLR 207(3) was inapplicable because of CPLR 218(b) (Addendum II), we look at the terms and legisla-

tive purpose of the section. The wording is inaccurately paraphrased by the court, we submit.

It reads:

"Where a cause of action accrued before, and is not barred when this article becomes effective, the time within which an action must be commenced shall be the time which would have been applicable apart from the provisions of this article, or the time which would have been applicable if the provisions of this article had been in effect when the cause of action accrued, whichever is longer."

The Advisory Committee notes to this transitional section from the C.P.A. to CPLR (effective September 1, 1963) make clear the purpose is two-fold: (1) To avoid the constitutional problem of revival of a barred cause of action; (2) where the period of any new provision of Article 2 (CPLR) is shorter than that provided by a section of former Civil Practice Act, to allow the claimant to invoke the old period of time (2 N.Y. Adv. Comm. Report 81(1953)).

To the same effect see Cordova v. City of New York, 293 NYS 2d 673 (Sup. Ct. 1968); Buckley Petroleum Products, Inc. v. Goldman, 28 NYS 2d 876 (4th Dept. 1967); McCabe v. Gelfand, 58 Misc. 2d 487 (1968); Brant Lake Shores, Inc. v. Barton, 367 N.Y.S. 2d 1005 (1970).

As Professor McLaughlin concisely puts it, subdivision (b) "is needed to avoid any constitutional problems that might arise if the statute of limitations on existing causes of action were suddenly abbreviated. (McKinney, vol. 7B, p. 560). Here no shortening of the six-year statute occurred, the time of limitation being the same in both the

old and new laws.

Only the Legislature can determine under what circumstances the limitation for commencement of an action shall be suspended (Mack v. Mendels, 249 N.Y. 356, 359). The limitation on the court's power to create "a tolling provision more liberal than the state legislature has seen fit to enact" was approved in Rosenberg v. Martin, 478 F 2d 520, decided in this Court of Appeals, Second Circuit, in 1973, with Lumbard, C.J., participating, on the application of N.Y. CPLR 218(b) (p. 526, n.8).

(A) DEAN JOSEPH M. McLAUGHLIN'S COMMENTS

The memorandum-order denying defendant's motions under FRCiv.P 52(b) and 59 for a partial new trial and to amend the findings refers to the arguments advanced by defendant (A43-45, A26-42). The court held that the general transistional provision, CPLR 218(b), (Addendum II) applies both to period or time limitations ("whichever is longer") and to exceptions or tolling provisions (§207, second clause) "departure from state", (Addendum I) as well.

"The major contention of defendant is that the court erred when it said that N.Y. CPLR 207(3) did not apply in this case because it was passed after the causes of action allegedly barred by the statute of limitations had accrued. Defendant claims that §218(b) * * applies only to provisions barring actions not brought within a certain number of years and not to tolling provisions." (A44).

Noteworthy here is that the Court treats the tolling provisions of §207, (first and second clauses of the main provision) as in the same category with the new exception thereto, subdivision three, which was added after the words, "this section does not apply", in 1962.

Defendant did not and never intended to claim that subsection 3" did not apply because it was passed after the causes of action allegedly barred by the statute of limitations had accrued". The statute, §207(3), passed in 1962, became effective in September 1963; the first transaction here, however, took place in December 1961 (plaintiff's

Ex. 1, A184) and consequently would not have been barred by the six-year limitation until December 1967.

The court below continued (A44, 45):

"For this contention she cites a commentary by Dean McLaughlin to N.Y. CPLR §302 and two cases /Slenker and Burris/. Dean McLaughlin's views while entitled to some weight, are not definitive, and the cases are not directly on point.

* * * *

There is no good reason not to apply the transitional provisions of §218(b) to the tolling provision as well as to the provisions requiring that actions be brought within a certain time."

Defendant contends that the purpose of the transitional section 218 was to avoid the shortening of periods or time limitations by the new CPLR revision of Article II. It had no counterpart as to subsection (b) in the transitional section of the N.Y. Civil Practice Act (§10, Addendum III, IV), from §414 of the Code of Civil Procedure, in part). The C.P.A. provision related only to cases where the time limitation had expired, not to causes of action accrued and not barred at the effective date. Thus, no judicial construction whatever of provisions in 218(b) occurred during the entire life of the Civil Practice Act and Rules.

Dean McLaughlin's comments fully support defendant's argument as to the legislative purpose of N.Y. CPLR 218(b):

"This section is designed to avoid any limitations problems that may accompany the transition from the CPA to the CPLR.

* * * *

This clause b is needed to avoid any constitutional problems that might arise if the statute of limitations on existing causes of action were suddenly abbreviated."

(N.Y. CPLR, 213(b), McKenney, 7B, pp. 559, 560).

For instance, an adverse possession which commenced before 1963 cannot give title in less than 15 years despite the newly shortened CPLR period of 10 years (Brant Lake Shares, Inc. v. Barton, 1970, 61 Misc. 2d 902). Likewise, McCabe v. Gelfand, 1968, 56 M 2d 497, 295 NYS 2d 583, holds that a ten-year period of limitations cannot be shortened in time by subdivision (b).

In other words, where the periods under the CPA and CPLR differ, the longer one governs. In the case at bar the six-year period applicable is the same under both the CPA §48(1) and CPLR, 213(2). Here there is no longer period either under CPA or CPLR to choose from.

Dean McLaughlin's comments on N.Y. CPLR 302(a)(1), construed in connection with N.Y. 207(3) are apposite. He says that the New York long-arm statute is retroactive, viz., a defendant could be served after September 1, 1963 for a cause of action arising out of the transaction of any business within New York prior thereto.

McLaughlin, CPLR, McKinney's, vol. 713, pp. 71ff.

Simonson v. International Bank, 14 NY 2d 281, 200 N.E. 2d 427, 1964.

U.S. v. First National City Bank, 379 U.S. 378, 13 L. Ed. 2d 365 (1965).

Dean McLaughlin commented at p. 71, supra, on the effect of the holding of retroactivity in Simonson as follows:

"An important by-product of the holding that CPLR 302 is retroactive, is that the statute of limitations against non-domiciliaries who committed the prescribed acts prior to September 1, 1963 resumed running on that date, and no further toll is available."

(Emphasis ours).

As to the two cases, deemed not on point by the court below, we have seen that Marcus definitively holds that, after effective enactment of CPLR 207 (3) in 1963, the tolling provision (second clause) becomes inapplicable while jurisdiction could be obtained over defendant under the long-arm statute (CPLR 302).

In the other cited case of Burris v. Alexander, 51 M 2d 543, 273 NYS 2d 542 (1966), the Supreme Court (Geller, J.) held that tolling of the statute of limitations does not apply in the case of defendant's absence when jurisdiction over defendant can be obtained without personal delivery of process within the state pursuant to CPLR 302 and 313, citing Dean McLaughlin's commentary (p. 544):

"Thus, after the effective date of the new enactment [CPLR 302] the statute was no longer tolled by reason of defendant's absence if service could be effectively made upon him outside the state. The effect of this is that the statute of limitations, which had been tolled in an action against a non-domiciliary because of inability to obtain personal jurisdiction over him, resumes running again from

the effective date of the new enactment in any situation encompassed in CPLR 207, 302 and 313 (see McLaughlin, Supplementary Practice Commentary, 7B, 1965 Supp. McKinney, CPLR 207)".

This decision was purportedly distinguished as not in point because by a trial court interpreting Tennessee statutes. Actually it construed foreign statutes under the New York "borrowing" statute, N.Y. CPLR 202 (Addendum, II and III) of which Judge Lumbard evidently was not aware.

Applying that decision to the instant action, the six-year period, which commenced to run from accrual dates in December 1961 to January 1963, continued to run to August 26, 1969, more than six years, and was not tolled even by defendant's removal in 1967, as found, since personal jurisdiction could have been obtained over her under CPLR 302 and 313, in 1967, 1968 and 1969. See plaintiff's Ex. 1 (A183-A225; A229-230).

**(b) PERTINENT CASES ON THE CONSTRUCTION OF THE
NEW YORK STATUTES INVOLVED WHICH WERE NOT DIS-
CUSSED BY THE COURT BELOW.**

Defendant's contention that construction of N.Y. CPLR 218(b), in conjunction with Sections 207 and 302 of the CPLR, requires consideration of the legislative purpose of enactment and policies, was emphasized by this Circuit Court in a carefully considered opinion per Anderson, C.J., Hoff Research Development v. Philippine Nat. Bank, 428 F 2d 1023

(2d Cir. 1970). This opinion of Judge Lumbard's Court was not cited to him at the trial. There the issue was whether a fraud cause of action, which accrued before N.Y. CPLR took effect, was barred by the C.P.A. limitation of six years from discovery rather than by the shorter period under CPLR of two years.

"This argument raises a question of state law not yet passed upon by the courts of New York and requires a reconciliation of two separate legislative policies embodied in parallel sections of the CPLR. On the one hand, Section 218(b) was enacted to preclude the shortening of pre-1963 limitation periods already running on numerous causes of action, thereby obviating potential constitutional difficulties. See e.g. Hastings v. H.M. Byllesby & Co., 293 N.Y. 413, 57 N.E. 2d 737 (1944). On the other hand, Section 203(f) was drafted to reduce to two years the interval within which a litigant must act on any cause with a limitation period which begins to run upon actual or imputed discovery. The question is which of these principles the legislature intended to govern a fraud cause of action which accrued under the CPA but was discovered only after the CPLR became effective.

(426 F 2d at 425-6).

The net effect of the decision of this Court in construing N.Y. CPLR 218(b) abbreviated a Civil Practice Act Limitation by a CPLR provision. In so hold^{ing}/this Court said in a footnote, p. 1025;

"The shortening of this time period to two years in Section 203(f) represents an effort to balance the interests of plaintiffs and defendants. See generally 1 Weinstein, Korn & Miller, supra note 2, Paragraph 203.35 at 2792-80."

The decision below, in effect judicially nullifying N.Y. CPLR 207(3) and 302 because of 218(b), gave no consideration to the legislative purpose and intent in enacting 218(b),

nor to the long history of the Section 207.

The problem is treated as though the New York long-arm statute does not exist and both presence and residence in the State are still requisite factors to in personam jurisdiction as in 1888. The history for a century from 1830 of the second clause of CPLR 207, formerly C.P.A. Section 19, departure from the state after accrual of a cause of action, is stated in Mack v. Mendels (249 N.Y. 356, 360 ff.). In that year the second clause was added in this form;

"It provided that if after the cause shall have accrued the debtor 'shall depart from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time' limited for the commencement of the action."

In Conn. Trust Co. v. Wead (172 N.Y. 497) the second clause as amended in 1888 was construed. Then it provided;

"If, after a cause of action has accrued against a person, he departs from and resides without the State and remains continuously absent therefrom for the space of one year or more, * * * the time of his absence * * * is not a part of the time limited for the commencement of the action."

The Court of Appeals in Mack pointed out that, prior to the 1888 amendment, suspension of the statute took place from departure from the state, "coupled either with non-residence or continuous absence from the state for one year * *. By the amendment the legislature required both conditions to concur. In Hart v. Kip, 148 NY 306, 42 N.E. 712, the Court held that departure and continuous absence from the

state for more than a year by a debtor who maintained a residence in this state did not create a suspension of the time limited for the bringing of an action" (249 NY at 362).

Continuing the consideration of Wead, the opinion in Mack stated (p. 363);

"If the statute had remained unchanged since 1888 we should not be called upon to determine the question which the court left unanswered, but the amendment to the statute in 1896 (Laws 1896, c. 665) has eliminated that question. Since then, under both clauses of the statute, presence within the state, not residence, is made the test of whether the period of statutory limitation runs against a debtor. An unbroken tradition of judicial construction of the language of the first clause has made certain the meaning of that clause, and the elimination from the second clause by the Legislature of residence without the state as a premise for the suspension of the running of the statutory period of limitation patently bars its inclusion by judicial construction."

Since the statute in Wead provided that each departure coupled with non-residence suspended the continued running of the period, it was of no practical importance that the statute might have begun to run against a non-resident while he was physically within the state.

"Since each departure by a non-resident after occasional visits here, or after a daily visit to a place of business here, would suspend the running of the time limited by the statute, the limitation seldom, if ever, created a bar to the bringing of an action against a non-resident. So the court held in Connecticut Trust & Safe Deposit Co. v. Wead, 172 N.Y. 497, 65 N.E. 261, 92 Am. St. Rep. 756, and neither that case nor the cases cited therein are authority for any rule of law more general in its scope." (249 NY 362).

The cases of both Wead and Mack are distinguishable

from the instant case in several respects. In both defendant was a non-resident of New York at the commencement of suit; in Wead he was a former resident of the state who on occasion revisited New York; in Mack he was a curb broker living in New Jersey, who went daily to his office at 50 Broadway in lower New York. In neither case was the situation that of defendant who maintained her New York apartment before and after purchase of her home in Las Vegas.

The plain object of the 1830 law, and of the 1888 and 1896 amendments, was to obtain personal jurisdiction over a non-resident defendant rather than to force a New York plaintiff to go outside the State to institute suit. But inasmuch as the Legislature eliminated in 1896 the premise of non-residence from the second clause for the suspension or tolling of the statutory period, its inclusion by judicial construction is in error (Mack v. Mendels, 249 N.Y. 356).

Furthermore, defendant's acquisition of another residence is irrelevant, since she retained her apartment in New York until October 1968 (A17).

(c) DEFENDANT COULD HAVE BEEN SERVED WITH PROCESS PURSUANT TO N.Y. CPLR 308(4) or 308(5), THEREFORE THE SIX-YEAR STATUTE OF LIMITATIONS WAS NOT TOLLED IN ANY EVENT.

The decision of the District Court said:

*McGuire maintains that plaintiff could have

served her under the long arm statute, N.Y. CPLR Section 302, or by some form of substituted service, N.Y. CPLR Section 308(5). See generally, Goodemote v. McClain, 40 App. Div. 2d 22, 337 N.Y.S. 2d 79 (1972). (Al7 ff.)

Then the court proceeds to dispose of defendant's dual contention by holding that personal service under the long-arm statute without the state because of Section 207(3), the new exception to tolling, is not applicable as a result of its construction of 218(b), CPLR. The constructive or substituted forms of service within the state under CPLR 308(4) and (5) are not considered or even touched upon in the Opinion (Al7-20).

This omission is indeed ironical in the light of the rulings of very recent New York decisions and an ALR annotation, "Absence as Tolling Statute of Limitations (55 ALR 3rd 1158). At page 1184 Goodemote v. McClain, 40 AD 2d 22, is commented upon as an instance of express statutory provision (Section 307(3)) excluding from application absences of defendant which do not prevent service upon him through substitution. No other case of statutory exclusion in the United States is cited in the annotation.

N.Y. RCPL 308(1)(4) and (5) read:

"Personal service upon a natural person shall be made by any of the following methods:

1. By delivering the summons within the state to the person to be served; or

* * * *

4. Except in matrimonial actions, where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either

the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by mailing the summons to such person at his last known residence; proof of such service shall be filed within twenty days thereafter with the clerk of the court designated in the summons; service shall be complete ten days after such filing;

5. In such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section."

Two very recent New York cases, cited to the lower court, were not referred to by it in its memorandum order denying defendant's motions and the order denying defendant's motion for reargument, which motion was unopposed by plaintiff (A46-64).

One such decision was that of American Trading Co., Inc. v. Fish, decided in the Supreme Court, New York County (N.Y.L.J., February 21st, 1974):

"Plaintiff asserts that there was a toll of the statute of limitations pursuant to CPLR Sec. 207, because it allegedly took approximately six months to ascertain defendant's residence address in Illinois. However, since the contract was negotiated, entered into and subject, by its own terms, to the laws in New York, there was continuous jurisdiction over defendant. It is immaterial whether he was actually served personally within or without New York. Since he could have been effectively served without the State, the statute is not tolled (CPLR 207(3)). * * * When such a defendant is amenable to service, the statute of limitations is not tolled. (Goodemote v. McLain, 40 A.D. 2d 22; Nelson v. Fraboni, 38 A.D. 2d 633). Unlike these cases, the plaintiff here was never given an incorrect address for the defendant. Plaintiff was actually always in possession of the address at which defendant was ultimately served. Consequently, since the defendant could have been served pursuant to CPLR 308(5) or CPLR 313 and CPLR 308(4), the statute of limitations was not tolled (CPLR 307(3))."

Such amenability to Section 308 service, notwithstanding absence from the state, was the decisive factor in American Trading:

"When such a defendant is amenable to service, the statute of limitations is not tolled. (Goodenote v. McLain, 40 A.D. 2d 22; Nelson v. Fraboni, 38 A.D. 2d 633).

* * * * *

Consequently, since the defendant could have been served pursuant to CPLR 308(5) or CPLR 313 and CPLR 308(4), the statute of limitations was not tolled."

In Nelson v. Fraboni, the Supreme Court denied defendant's motion to dismiss based upon the statute of limitations. On appeal the Appellate Division reversed and held the three-year statute was not tolled during defendant's absence for eleven months even though a question of fact existed as to whether her whereabouts during that period were open and notorious. Said the court:

"Defendant claims that the Statute was not tolled while defendant was absent from the State because such tolling is excepted under CPLR 207 where jurisdiction over defendant can be obtained without personal service on him within the State, as in the case of sections 253 and 254 of the Vehicle and Traffic Law, CPLR 308 and CPLR 313. Special Term found questions of fact to be determined before a determination could be reached as to whether the Statute had run. We hold that even if those issues were resolved in favor of the plaintiff, the action is barred as a matter of law by the Statute of Limitations. There was no attempt made by plaintiff to use any of the available means to effect service on defendant in the instance case. CPLR 207 provides that 'If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for four months or more, * * * the time of his absence * * * is not a part of the time within which the action must be commenced.' The section does not apply, however, 1. while there is in force a designation, voluntary or involuntary, made pursuant to law, of a person to whom a summons may be delivered

within the state with the same effect as if served personally within the state; or * * * 3. while jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to him within the state".

(Italics ours).

Continuing at page 936 (326 NYS 2d) the Appellate Division said:

"Without a showing by plaintiff of at least an attempt to obtain service on defendant in the present case by use of the pertinent Vehicle and Traffic Law sections, or pursuant to CPLR 308 or CPLR 313, any one of which methods under the circumstances here would have been practicable, with the probability of actual notice reaching defendant, we conclude that defendant was at all times amenable to process. The Statute of Limitations, therefore, was not tolled while defendant was absent from the State. (Fuller v. Stuart, 3 Misc. 2d 456, 153 N.Y.S. 2d 188; Caruso v. Bard, 20 Misc. 2d 887, 194 N.Y.S. 2d 535; King v. Killum, 39 Misc. 2d 48, 239 N.Y.S. 2d 1013)."

Noting that this case was apparently instituted by service on defendant's husband, not handed to defendant, under CPLR 308(4) or (5), we turn to the record here as to plaintiff's efforts, if any, to effect service upon defendant under 308(4), substituted service, under 302 or under 313 (personal service outside the State).

The short answer is none whatsoever. Plaintiff simply testified on direct: that, the last time she went to defendant's apartment, 525 Park Avenue, was in 1967; that in 1968 in the latter part of the year plaintiff was told that she (defendant) had moved, and "no longer lived there",

"Q. Did you try to find out where Miss McGuire moved to?

A. I tried by inquiring from the doorman.

Q. Were you able to locate her?

A. No."

(A108-109).

Plaintiff resumed the examination, said that she had two attorneys and the latter, Mr. Drimmer, was able to locate defendant in Nevada (by reason of his theatrical connections) where process was served personally on her in August, 1969.

Admittedly, no effort was made to serve defendant either by substituted service (308(4) at defendant's New York apartment or by court order under 308(5) or under the CPA Sections 230, 231 (A109-112). Those methods are permitted only after a showing of due diligence to attempt personal service under 308(1). Since plaintiff never even attempted to go in 1967 or 1968 to the door of defendant's New York apartment, nor did her attorneys' process server, the showing of due diligence required under 308(1) is entirely absent. As in Nelson, supra:

"* * no attempt was made by plaintiff to use any of the available means to effect service on defendant in the instance case."

Therefore, the court concluded that defendant was amenable to process despite her absence from the state and the statute was not tolled.

By the great weight of authority, amenability to service, even without an express statute excepting such absence, as in New York, renders tolling provisions inapplicable (55 ALR 3rd 1162-1163, 1179-1183).

It follows necessarily that the ruling below of tolling despite amenability to personal service could not be applied in the Second Circuit to cases coming from Connecticut.

There "abode" service of process is customary as opposed to "in-hand" delivery in New York. The writ, summons and complaint are simply slipped under the door when defendant is either not at home or absent from Connecticut.

Thus, as long ago as 1844 the Supreme Court of Errors of Connecticut held that continued amenability to personal service made nugatory a tolling provision while a party is "without the state", since defendant could have been subjected to personal liability by leaving process at his domicile.

Sage v. Hawley, 16 Conn. 106, 55 ALR 3rd 1191-1192.

As in the case at bar defendant in Sage v. Hawley, supra, left the state occasionally on business or professional purposes, but continued to maintain a domicile within the State, at which place process could have been served.

Also, in Clegg v. Bishop (1927) 105 Conn. 564, 136 A 102, the Supreme Court of Errors [now Supreme Court] held that the statute was not suspended under a saving clause for

tolling on account of absence, where defendant maintained two residences, one within and another outside Connecticut. The Clegg case is plainly apposite in that defendant in the instance case, also maintained two residences, at both of which process could have been served which would have subjected her to personal liability.

The decision here, if it stands, results in conflicting decisions on absence as tolling statutes of limitations in this Second Circuit, viz., in New York and Connecticut. As shown "abode" service is customary in Connecticut as opposed to hand delivery "in New York", except in substituted service procedure.

Moreover, in New York in these post International Shoe days (1945), jurisdiction obtained under N.Y. CPLR 308(5) is purely a matter of notice, and not that of conferring jurisdiction over the person as in the days of Conn. Trust & Safe Deposit Co. v. Wead (supra) (1902) or Mack v. Mendels, (supra) (1928). See Arroyo v. Arroyo, Sup. Ct., Kings Co. Sp. Term, Pt. V, January 16, 1974, N.Y. Law Journal.

Consequently, the essential purpose of the former tolling statute, viz., to secure personal service within the territorial limits of New York despite defendant's absence therefrom no longer obtains. In this very case personal service under 302, N.Y. CPLR was effected in 1969 upon defendant in Nevada, 3,000 miles removed from New York.

POINT II

THE BURDEN OF PROOF ON THE ASSERTED TOLLING
OF THE STATUTE OF LIMITATIONS (SIX YEARS)
WAS IMPROPERLY IMPOSED ON DEFENDANT.

"McGuire also contends that she was never absent from New York for more than four months. Although absence from the State and not residence outside is the test, Mack v. Mendels, 249 NY 356, 164 N.E. 2d 248 (1928), residence outside the state puts the burden on the defendant to show sufficient presence in the state to prevent a tolling, McAvoy v. Harron, 26 A.D. 2d 545 (1966)."

(Decision, A17-18).

The foregoing ruling is unquestionably right as to N.Y. CPLR, first clause, pertaining to a person against whom a cause of action has accrued when he is without the State. The statute of limitations, whatever it may be, is in terms tolled until he "returns to or comes into the state". In the cited case, McAvoy v. Harron, (supra), defendant was a Canadian national who never took up residence in New York before or after the cause accrued or suit was commenced and he seldom came to New York so as to be available for service. In that case his non-residence in New York was properly implied from his foreign domicile and residence. Actually the case went to the Court of Appeals and was affirmed without opinion, 21 N.Y. 2d 821, 235 N.E. 2d 910).

The problem here, however, is with the construction of the second clause of 207, CPLR, relating to departures from the state and remaining continuously absent for four months

or more, in conjunction with our six-year limitation period (now CPLR 213), which was the same under the Civil Practice Act.

Incidentally, while defendant pleaded the affirmative defense of the six-year statute, plaintiff filed no reply thereto.

Professor McLaughlin's comments in 1972 on the burden of proof on tolling for defendant's absence are instructive;

"Since the statute of limitations is an affirmative defense, the general rule is that the defendant carries the burden of persuading the court that the statute has expired. Usually, the defendant carries his burden simply by demonstrating that the statutory period has expired since he is under no obligation to negate an exception to the statute of limitations. If the plaintiff claims that the period of limitations has not expired because of a toll or other extension the burden of proving this exception to the statute of limitations should rest with plaintiff. See Deyon v. Bascom, 1971 38 AD 2d 645, 326 NYS 2d 896. If the plaintiff claims that the statute of limitations was tolled by defendant's absence from the state, the plaintiff should have to prove this, although if the defendant is a non-resident there is a presumption that he was at all times outside New York. See Beresovski v. Warszawski, 28 N.Y. 2d 410, 322 NYS 2d 673."

The test as to "continuous absence" under the second clause of 207 rests on presence, not non-residence.

Mack v. Mondels, 249 N.Y. 356 (1928).

Bannister v. Solomon, 126 F 2d 740, CCA 2d 1942.

In Bannister the Court of Appeals, per Learned Hand, said that continuous absences from state and not continuous

residence outside was the test for tolling a statute under CPA Section 19, now CPLR 207, second clause. There a presumption of absence was raised by the unexplained absence of a housewife, whose occupation did not call her away regularly.

Here Miss McGuire's mere acquisition of a another residence did not raise a presumption of continuous absence from New York for at least four months.

She was frequently called away by her engagements as an entertainer but the evidence of those performances in 1967 and in 1968 will show the length of absence and her return to her New York apartment thereafter. At no time did she remain outside the state for our continuous months.

Indicative that defendant did not "change her residence" in June 1967, is the affidavit of Fred Alexander, a neighbor of defendant who did construction work for defendant in 1967 (A33). Such evidence was not produced at the trial since plaintiff has repeatedly claimed that mere non-residence, not continuous absence, was sufficient to toll the statute. On the contrary defendant has relied on the well-known proposition that a person may have two or more residences but only one domicile.

Counsel was taken by surprise at the trial by the shifting of the burden of proof, or of going forward, upon defendant because of her Las Vegas home, while she also con-

tinued to maintain her apartment in New York.

We respectfully submit that the construction put upon the second clause, resting upon defendant's "change of residence" was erroneous, the clause not being susceptible to judicial construction as to non-residence but only as to continuous absence.

In the recent case of Karlin v. Avis, 326 Fed. Supp. 1325, Judge Bartels points out that the new concept of in personam jurisdiction entails two distinct ideas: fair notice to defendant and a basis for jurisdiction. Before CPLR 302(a) (1) the requirement was territorial, within the State of New York. Now that jurisdiction over a non-resident may be based on transaction of business inside the state, the court's concern is only with the notice giving element.

In Karlin defendant, a business man, was domiciled in Michigan, spending much of his time between Michigan, New York, Mexico and Europe. He leased an apartment in his name in New York City and paid the rent. Service of process under CPLR 308, subd. 2, delivered to a person staying there, was held good for it was calculated to give fair notice to defendant under the long-arm statute.

"What is a 'last known address' depends upon the particular circumstances of each case and the extent to which it may be reasonably regarded as a place where a defendant is likely to receive a notice addressed to him. If an individual has an address that has been used by him and is known as such, the mailing of the summons to that address will serve the notice function of the statute."

This reasoning renders consideration of defendant's "change of residence" irrelevant in view of the element of territorial jurisdiction being absent. Now it is a question of whether or not defendant gets fair notice of the action. Thus, his "presence" today should not be a determinative factor as it was in Mack v. Mendels (*supra*). Similarly, the citation of Conn. Trust & Safe Deposit Co. v. Wead, (172 N.Y. 497) to the effect that a non-resident's casual trips to the state do not break the absence under the 1888 statute loses all significance.

The following colloquy at the close of the trial supports, we think defendant's surprise at the imposition of the burden on tolling on her:

The Court: You say even though this is a defense you raise, the burden is on the plaintiff?

Mr. Weidlich: No, the burden as to the exception of the statute of limitations -- the burden is on him.

The Court: That is not my question. My question is, who has the burden of establishing that a claim is barred by the statute of limitations. I think the party making the claim.

Mr. Weidlich: That is true but the cases are very clear when it comes to tolling the statute --

The Court: That is something else. Please answer my question.

Mr. Weidlich: Oh, the burden is on defendant to show that the claim is barred by the statute of limitations.

The Court: When it comes to whether the statute was tolled, that would be on the plaintiff.

Mr. Weidlich; Yes.

The Court; Mr. Drimmer, do you agree with that?

Mr. Drimmer; Yes, to some extent, I will agree to that fully except that in this case -- and I think I can cite cases that will show that it is up to the defendant to show -- the burden is upon the defendant to establish that the plaintiff had knowledge where the plaintiff could be served.

Mr. William Weidlich; Not where the plaintiff could be served.

Mr. Drimmer; Where the defendant could be served.

Mr. William Weidlich; I am sorry to interrupt.

Mr. Drimmer; Yes, I think I can establish cases on that. In all other respects I would say the burden of establishing the tolling is on the plaintiff, with the exception of the fact that the defendant has the burden of establishing that the plaintiff had knowledge of the defendant's whereabouts. (A 56).

In the recent case of Mucci v. Judson, 74 N 2d 670, (1973) the Supreme Court of the State of New York dismissed the complaint as barred by the statute of limitations (three years). Plaintiffs asserted the statute was tolled by the defendant's absence from New York.

The Court (Boomer, J.) imposed the burden on plaintiff's of ascertaining defendant's out-of-state mailing address. Since plaintiff's took no steps to get defendant's address there was no resultant toll.

*The Nelson case, supra, 38 A.D. 2d 633, 326 N.Y.S. 2d 934, indicates that there can be no tolling of the statute even where defendant's whereabouts without the state were not open and notorious, where personal service can be effected under CPLR 308."

The Court stated,

"(P. 633, 326 N.Y.S. 2d p. 936) "We hold that even if those issues /whether defendant's whereabouts were open and notorious/ were resolved in favor of plaintiff, the action is barred as a matter of law by the Statute of Limitations. There was no attempt made by plaintiff to use any of the available means to effect service on defendant in the instant case. * * * Without a showing by plaintiff of at least an attempt to obtain service on defendant in the present case by use of the pertinent Vehicle and Traffic Law sections, or pursuant to CPLR 308 or CPLR 313, any one of which methods under the circumstances here would have been practicable, with the probability of actual notice reaching defendant, we conclude that defendant was at all times amenable to process. The Statute of Limitations, therefore, was not tolled while defendant was absent from the State." (Emphasis Supplied). There, as here, the defendant, before she left the state had resided with her mother in the state, and her mother continued to reside in the state at the same address during the period of the statute of limitations. There, as here, service by delivery to the mother under CPLR 308 was practicable, and the statute was not tolled.

The motion to dismiss is granted.

(346 NYS 2d 673, 674).

As to the plaintiff's contention on the trial that defendant had the burden of establishing "that the plaintiff had knowledge of defendant's whereabouts", the short answer thereto was made in Nucci as follows;

"And she /defendant/ could have been served under CPLR 308 even if plaintiffs could not obtain her out of state address. Subdivision 5 of Section 308 of the CPLR provides that if service is impracticable under the other Subdivisions of that section, it may be made in such manner as the court upon motion without notice directs.

Defendant was frequently called away by her engagements as an entertainer but the evidence of those performances in 1967 and in 1968 will show the length of absence and her return to her New York apartment thereafter. At no time did she remain outside the state for four continuous months.

Indicative that defendant did not "change her residence" in June 1967, is the affidavit of Fred Alexander, a neighbor of defendant who did construction work for defendant in 1967 (A33-34). Such evidence was not produced at the trial since plaintiff has repeatedly claimed that mere non-residence, not continuous absence, was sufficient to toll the statute. On the contrary defendant has relied on the well-known proposition that a person may have two or more residences but only one domicile.

Counsel was taken by surprise at the trial by the shifting of the burden of proof, or of going forward, upon defendant because of her Las Vegas home, while she continued to maintain her apartment in New York. See Appendix A26-29, 30-42 for notice and affidavits submitted on the motions under FRCiv.P 52(b) and 59. The court's memorandum - order is set out in the Appendix at 43-45.

POINT III.

THE CONSTRUCTION OF THE TOLLING STATUTE (N.Y. CPLR 207) DEPRIVES DEFENDANT OF EQUAL PROTECTION OF THE LAWS, CONTRARY TO THE XIVth AMENDMENT TO THE U.S. CONSTITUTION.

In the recent past the expansion of the Equal Protection Clause of the XIVth Amendment to procedural statutes and rulings in both state and federal courts is notable.

An illustration of this trend is Boddie v. State of Connecticut (401 U.S. 371, 28 L. Ed. 2d 113) decided in March 1971. There the Court, per Harlan, J., held that it was a denial of due process to indigent females in refusing them access to the Superior Court in Connecticut in divorce actions, unless they paid filing and publication fees, which they were unable to do.

Both Douglas and Brennan, JJ., concurred on the ground that the refusal of the Clerk of the Connecticut Superior Court to accept process without payment of his fees was a denial of equal protection of laws under the XIVth Amendment. Said Mr. Justice Douglas:

"The reach of the Equal Protection Clause is not definable with mathematical precision. But in spite of doubts by some, * * rather definite guidelines have been developed; race is one (Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664; McLaughlin v. Florida, 379 U.S. 184, 13 L. Ed. 2d 222); alienage is another (Takahashi v. Fish & Game Comm'r., 334 U.S. 410, 92 L. Ed. 1478; religion is another (Sherbert v. Verner, 374 U.S. 398, 10 L. Ed. 2d 965); poverty is still another (Griffin v. Illinois, *supra*; and class or caste yet another (Skinner v. Oklahoma, 316 U.S. 535, 86 L. Ed. 1655)."
(401 U.S. 385).

Said Mr. Justice Brennan at p. 389, 401 U.S.:

"A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee. * * * In my view, Connecticut's fee requirements, as applied to an indigent, is a denial of equal protection."

In the next term of court (Nov., 1971) the Court in Reed v. Reed (404 U.S. 71, 30 L. Ed. 2d 225), struck down an Idaho statute which favored male applicants for letters of administration over female members of the same class.

Said the Court, per Burger, Ch. J.:

"In applying the clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 U.S. 27, 28 L Ed 923, 5 S Ct 137 (1885); Lindsley v. Natural Carbonic Gas Co., 220 US 61, 55 L Ed 369, 31 S Ct 337 (1911); Railway Express Agency v. New York, 336 US 106, 93 L Ed 533, 69 S Ct 463 (1949); McDonald v. Board of Election Commissioners, 394 US 802, 22 L Ed 2d 739, 89 S Ct 1404 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power of legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 US 412, 415, 64 L Ed 989, 990, 40 S Ct 560 (1920).

(404 U.S. at 75-76).

The Idaho Supreme Court thought that elimination of women from consideration was not an arbitrary method devised by the legislature to relieve the probate court of its workload, inasmuch as the issue of preferment between male and female would require a court hearing.

"Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether Section 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; * * *".

(404 U.S. 76).

Cases on equal apportionment also deal with "invidious discrimination" prohibited by the Equal Protection Clause.

Reynolds v. Sims, 377 U.S. 533, 12 L Ed. 2d 506 (1964).

A resumé¹ of the decisions on application of the Equal Protection clause from the first Brown decision (Brown v. Board of Education, 347 U.S. 483, 1954) is given in Swindler, Court & Construction in the Twentieth Century, Bobbs-Merrill Co., Inc., 1974.

The latest decision by the United States Supreme Court on the equal protection clause was handed down yesterday (April 23rd, 1974). The Court by a vote of 5-4 refused to rule on the claim of "Reverse Discrimination" in De Funis v. Odegard on the ground it was moot, since the appellant had remained in law school during litigation and would graduate this June (40 L. Ed. 2d 164).

In the majority opinion it was said: "if the admission procedures of the law school remain unchanged, there

is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court * * ".

In De Funis the thrust of the case is against policy procedures of a state university in the admission of students to its law school.

In the case at bar the New York statutory limitations of actions, and exceptions thereto, are not attacked on their 'face violative' of the equal protection clause of the United States Constitution. It is the judicial procedure or construction of New York statutes which violated defendant's rights to the equal protection of those laws as a domiciliary of New York and as a member of the class of persons having dual ownership of residences in two states.

Until October 1968 defendant was a member of the class of New York domiciliaries, maintaining two residences after June 1967. The finding that defendant "removed" to Nevada in 1967 is not a finding of change of domicile (Opinion, A17 top of page).

Consequently, defendant has been deprived of the benefits of substituted service, under N.Y. CPLR 308(4) or (5) as well as under predecessor CPA provisions, as a member of the class of New York domiciliaries.

POINT IV.

DESPITE DEFENDANT'S APPEARANCE THE AMENDMENTS
PERMITTED TO THE COMPLAINT AND PLEADINGS ARE
NOT WITHIN THE JURISDICTION OF THE COURT
(CPLR, 302(b)).

The Court has found that various causes of action arose viz, sales of goods and/or services, re-doing defendant's bathroom and ordering the SERPE fixtures and the like, Plaintiff, on the other hand, in her testimony and brief, has insisted that she entered into a single transaction in October 1961 (Invoice dated 12/26/61) (A149-182).

CPLR 302(b) allows a defendant to defend an action, brought under the single act, long-arm statute (302(a)(1)), without being required to defend all manner of claims, not arising out of the original transaction, asserted against him: "to hold otherwise would fashion the long-arm statute into an instrument of oppression." (McLaughlin, CPLR Commentaries, 7B, p. 94). CPLR 302(b) provides:

"Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section."

In this connection the court seems to concur in defendant's contention that each invoice represents a separate, divisible transaction ("these invoices were demands for payments and from their dates each cause of action accrued). (Opinion, A19).

The finding that each invoice constitutes a demand for payment from its date, evidence of mailing or delivery being absent, is contrary to plaintiff's testimony and

judicial admissions:

"Plaintiff completed the services rendered in decorating the defendant's apartment in 1964. Before she commenced work she received a \$5,000. deposit and was not entitled to payment until the work was completed in 1964. Although plaintiff sent an invoice after each and every item of furniture, etc. was delivered, plaintiff did not make any interim demands for payment."

(Emphasis ours).

(Plaintiff's Pre-trial Memorandum, p. 4).

"In the instant case the plaintiff received a \$5,000. deposit. * * * Obviously, the plaintiff was not in default while the plaintiff continued to make delivery of the items plaintiff was not entitled to receive any money other than a deposit until completion of the contract."

(Emphasis ours)

(Plaintiff's Brief on Motions for Summary Judgment).

"Although plaintiff rendered statements for each job done, she did not request payment of any further moneys until the job was completed or to the extent that the plaintiff was prevented from completing same."

(Plaintiff's Trial Brief, p. 2).

If the foregoing admissions that no demand by plaintiff for payment was ever made at a specified time be regarded as a stipulation in open court (Nassau County v. Kensington Association, 21 NYS 2d 208), there is no evidence in the case as to when any of the causes of action accrued for the purpose of bearing interest. Certainly, the testimony that plaintiff asked for payment in 1965 or after the claimed completion of contract was not found by the Court. Instead it found that "the transactions simply petered out as a relations

came to an end (Decision, p. 5). (A15).

Chinn v. Butchers' Mut. Casualty Co., 71 NYS 2d 70, where plaintiff failed to show accrual date, interest was allowed only from the time the action was started.

Where the time the cause of action arose is a matter of conjecture, interest to be included in the judgment under N.Y. CPLR 5001, should be computed from date of institution of action.

Industrial Bank of Utica v. Morse, 189 NYS 2d 979.

Gelco Buildings & Burjay Constr. Corp. v. Simpson Factors Corp., 301 NYS 2d 728 (1969).

It follows, we submit, that interest, if awarded to plaintiff, should be computed from the date of institution of the action, August 26th, 1969.

C O N C L U S I O N

For the foregoing reasons, it is respectfully requested that the judgment of the District Court, entered in favor of plaintiff be reversed and vacated and, in the alternative, that the order of the court denying defendant's motions for a partial new trial and to amend certain findings be reversed.

Respectfully submitted,

WEIDLICH & ROGERS,
Attorneys for Defendant-Appellant
Phyllis McGuire,
300 Madison Avenue,
New York, N. Y. - 10017 - (MU 2-1446).

Of Counsel:
CLIFTON F. WEIDLICH
WILLIAM F. WEIDLICH.

ADDENDUMSTATUTES

N.Y. CPLR 207(3)

Defendant's absence from state or residence under false name.

If, when a cause of action accrues against a person, he is without the state, the time within which the action must be commenced shall be computed from the time he comes into or returns to the state. If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for four months or more. This section does not apply:

* * * *

3. While jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to him within the state.

N.Y. CPLR 213(2)

Actions to be commenced within six years: where not otherwise provided for; on contract; on sealed instrument; on bond or note, and mortgage upon real property; by state based on misappropriation of public property; based on mistake; to establish a will; by corporation against director, officer or stockholder; based on fraud.

The following actions must be commenced within six years:

1. An action for which no limitation is specifically prescribed by law;
2. An action upon a contractual obligation or

liability express or implied, except as provided
in Article 2 of the uniform commercial code;

* * * *

N.Y. CPLR 218

Transitional provisions.

(a) Actions barred at effective date. Nothing in this article shall authorize any action to be commenced which is barred when this article becomes effective, except insofar as the right to commence the action may be revived by an acknowledgment or payment.

(b) Cause of action accrued and not barred at effective date. Where a cause of action accrued before, and is not barred when this article becomes effective, the time within which an action must be commenced shall be the time which would have been applicable apart from the provisions of this article, or the time which would have been applicable if the provisions of this article had been in effect when the cause of action accrued, whichever is longer.

N.Y. CPLR 202

Cause of action accruing without the state. An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the

cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

N.Y. CPLR 301

Jurisdiction over persons, property or status.

A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

N.Y. CPLR 302(a) 1 and 4(b)

Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction.

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. Transacts any business within the state; or

* * * * *

4. Owns, uses or possesses any real property situated within the state.

(b) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

N.Y. CIVIL PRACTICE ACT §10

GENERAL PROVISIONS.

Application of article. The provisions of this article apply and constitute the only rules of limitation applicable to a civil action or special proceeding, except in one of the following cases:

1. A case where a different limitation is specially prescribed by law or a shorter limitation is prescribed by the written contract of the parties.

2. A case where the time to commence an action has expired when this article takes effect.

The word "action" contained in this article is to be construed, when it is necessary so to do, as including a special proceeding or any proceeding therein or in an action (Code §414, in part).

N.Y. CIVIL PRACTICE ACT §19

Effect of defendant's absence from state or residence under false name. If, when the cause of action accrues against a person, he is without the state, the action may be commenced, within the time limited therefor, after his coming into or return to the state. If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for the space of four months or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the

state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time limited for the commencement of the action. But this section does not apply in either of the following cases:

1. While a designation or appointment, voluntary or involuntary, made in pursuance of law, or a resident or nonresident person, corporation, or private or public officer on whom a summons may be served within the state for another resident or nonresident person or corporation with the same legal force and validity as if served personally on such person or corporation within the state, remains in force.

2. While a foreign corporation has had or shall have one or more officers or other persons in the state on whom a summons for such corporation may be served. (Am. L. 1928, ch. 809, Sept. 1; L. 1943, ch. 263, Sept. 1; Code § 401).

F.R. CIV. P. RULE 52

Rule 52. Findings by the Court.

* * * *

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

F.R. CIV. P. RULE 59

Rule 59. New Trials: Amendment of Judgments.

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966.

N.Y. CPLR 308(1)(4)(5)

Personal Service Upon a Natural Person:

Personal service upon a natural person shall be made by any of the following methods:

1. By delivering the summons within the state to the person to be served; or

* * * *

4. Except in matrimonial actions, where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of

abode within the state of the person to be served and by mailing the summons to such person at his last known residence; proof of such service shall be filed within twenty days thereafter with the clerk of the court designated in the summons; service shall be complete ten days after such filing;

5. In such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

N.Y.CPLR 5602(b)

Appeals to the court of appeals by permission:

* * * *

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. From an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

* * * *

§48(1) C.P.A.

Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:

1. An action upon a contract obligation or liability express or implied, except a judgment and except as provided by section forty-seven and section forty-seven-a.

U.S. COURT OF APPEALS:SECOND CIRCUIT**BROEDY,**

Appellee,

against

~~XXXXXXXXXX~~
MC GUIRE,

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele; being duly sworn,
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 26th day of June 1974 at 36 W. 44th Street, New York

deponent served the annexed

Appellant's Brief

upon

Leight, Drimmer & Weinstein-Attorneys for Appellee

the in this action by delivering ^{its} true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 26th'

day of June

1974

James Steele

Print name beneath signature

JAMES STEELE

ROBERT T. BRIN

NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975*Robert T. Brin*

